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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 157

VINCENT CIUCCI, SR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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Grant, *Successive Prosecutions by State and Nation; Common Law and British Empire Comparisons,* 4 U.C.L.A. Law Rev. 1 (1956) 43

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Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction,* 39th Cong., 1865-1867 (1914) 29

Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 Yale Law Jour. 513, 515 18

Lugar, *Criminal Law, Double Jeopardy and Res Adjudicata* (1954) 39 Iowa Law Rev. 317 27

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

Petitioner, Vincent Ciucci, Sr., is under a sentence of death imposed by an Illinois Court. The Supreme Court of Illinois affirmed, and he brought his petition for certiorari to this Court claiming that in violation of his rights under the 14th Amendment, the State of Illinois subjected him to four trials under charges of murder, using the same evidence, for the same alleged act which according to the State's theory resulted in the death of four persons: Petitioner's wife and his three children. This Court granted

certiorari. The Petitioner respectfully prays that the judgment of the Supreme Court of Illinois be reversed.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 8 Ill. 2d 619, 137 N.E. 2d 40 (1956), and is reprinted at R. 366-372.

Jurisdiction

The final judgment of the Supreme Court of Illinois was entered on September 21, 1956 on denial of rehearing (R. 375). On September 26, 1956 the Supreme Court of Illinois granted a stay of execution of the death sentence pending disposition of the petition for writ of certiorari in this Court (R. 376). Petition for certiorari was filed on December 11, 1956 and was granted on June 3, 1957 (R. 376).

The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1257 (3).

Questions Presented

1. Whether under the 14th Amendment to the Constitution of the United States the plea of double jeopardy applies to Petitioner's case in which he complains that he was indicted in the State of Illinois under four separate indictments charging the crimes of murder, and he was brought before a jury on one indictment charging that he murdered a named individual member of his family; but without notice by any pleading, he was confronted at his trial with evidence that he had murdered his wife and three children, none of these facts having been alleged in the indictment under which he was tried, found guilty and sentenced to death.

2. Whether under the 14th Amendment to the Constitution of the United States Petitioner was denied due process of law, and denied a fair and impartial trial in the Illinois state court where he was brought to trial under one of four indictments charging the crimes of murder, and he was brought before a jury to face the charge that he had murdered a named individual member of his family; but without notice by any pleading, he was confronted at his trial with evidence that he had murdered his wife and three children, none of these facts having been alleged in the indictment under which he was tried, found guilty and sentenced to death.

3. Whether under the 14th Amendment to the Constitution of the United States the Petitioner was denied due process of law in the Illinois state court where he was tried for the crime of murder of his son, and the state had elected to prosecute Petitioner separately for the alleged murder of Petitioner's wife and their three children, but

the court allowed the state to introduce in evidence proof that at the same time and place Petitioner's wife and three children were killed.

4. Whether under the 14th Amendment to the Constitution of the United States Petitioner was denied due process of law and denied a fair and impartial trial when the Supreme Court of Illinois affirmed the conviction and death sentence of Petitioner after rulings in the trial court which clearly showed that the trial court in Petitioner's case did not adhere to the adopted and recognized rules of evidence in criminal trials in the courts of the State of Illinois.

Statutes Involved

Chap. 38, Sec. 358, Ill. Rev. Stat. (1953).

HOMICIDE

Act of March 27, 1874, resumed.

(Murder) 140. Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned had malignant heart.

Chap. 38, Sec. 360, Ill. Rev. Stat. (1953).

(Murder—Punishment) 142. Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court.

Statement

(a) *The facts.*

On December 5, 1953, at about 2:00 A.M. a fire of unknown origin was discovered in the home of Petitioner (R. 366, 367).[1] Petitioner's wife and his three children

[1] The Record consists of two parts: Part I contains the Clerk's Mandatory Record, or the "Common Law Record" as it is called

were found dead. Autopsies later performed showed that the primary cause of death was inhalation of carbon monoxide (R. 285, 296, 366). Further examinations also revealed that each had a hole penetrating the head (R. 282-290). There were no eye witnesses to the origin of the fire or to incidents in or about Petitioner's home the evening of December 4, 1953. The evidence against Petitioner was circumstantial (R. 371).

In December of 1953, the Petitioner was first indicted in four separate indictments. No. 53-2415 charged the murder of Anna, wife of Petitioner. The other three, Nos. 53-2416, 53-2417 and 53-2418, charged the murder of Virginia, Angeline and Vincent, Jr. Petitioner was first brought to trial for the alleged murder of his wife (R. 2). He was found guilty and sentenced to serve a term of twenty years in the Illinois State Penitentiary.

Upon return to the jury's verdict the prosecuting attorney announced that Petitioner would be tried again "... and again and again, if needed, ..." "... if the death penalty is spurned a second time, Ciucci will be tried for the third murder and, if necessary, for the fourth" (Appendix A).

The first trial revealed defects in the indictments returned in 1953. As a consequence, the State's Attorney, in March of 1954, obtained other indictments against Petitioner (R. 6). Nos. 54-839, 54-840 and 54-841 charged Petitioner with the murder of his children, Vincent, Jr., Virginia and Angeline (R. 6). Then on April 2, 1954, the State's Attorney moved for a *nolle prosequi* of the remaining three of the four indictments that had been returned

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under Illinois Practice, and Part II contains the Bill of Exceptions or the report of trial proceedings. Unless otherwise indicated by the letters "C.L.," all references to the Record are to Part II.

against Petitioner in 1953.[2] Petitioner was next brought to trial on indictment No. 54-839 which charged the death of Angeline. He was found guilty on the same evidence as was submitted by the prosecution in 53-2415 and in the instant case (R. 2). The jury imposed a sentence of forty-five years in the State Penitentiary (R. 2). Immediately thereafter the State Prosecutor announced that, "we are very disappointed, as we were in the first trial, . . ." ". . . we are going to try the two other cases. Nothing short of the death penalty will satisfy the State and we hope to get a jury that will realize the magnitude of this crime" (Appendix E).

Petitioner was next brought to trial on the indictment at bar which charged him with the murder of his son Vincent. This was the third attempt of the State to obtain a death sentence against Petitioner. However, this ended in a mistrial (R. "C.L.". 5). The fourth trial on the same indictment went to a jury which returned a verdict finding defendant guilty and imposing the death sentence (R. 354). There is still pending in the trial court indictment No. 54-840 which charges Petitioner with the murder of Virginia, his daughter (R. 7).

At the outset of the fourth trial, the Petitioner by a motion to dismiss (R. 2-3) raised federal constitutional questions concerning his being subjected to a trial on the same facts which had been submitted to two other juries and which had resulted in two sentences for the same alleged crime (R. 2-3). Petitioner in his motion stated

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[2] At the time of the motion to *nolle*, there were in fact six pending indictments against Petitioner. Although the experiences of the first trial had served as a training ground for presentation of evidence against Petitioner, the State's Attorney did not move to dispose of the pending indictments until three more were returned by the Grand Jury (See Appendix D new article, Chicago Sun-Times, Sunday, March 21, 1954).

that ". . . the alleged facts and evidence upon which the instant indictment number 54-839 is based, are the same; that a trial in this instant case will be a retrial of the above and foregoing two named indictments, viz.: 54-841 and 53-2415; that a trial in the instant case would place the defendant in jeopardy twice for the same offense, in violation of his Constitutional rights . . ." (R. 3). The Petitioner also moved for the exclusion in the instant trial of evidence of deaths other than the one alleged and described in the present indictment (R. 3-4).

The allegations contained in Petitioner's motions were not denied by the State. The position of the State was that the offense charged in the instant indictment was separate even though the evidence of the death of each of the four persons found dead on December 5, 1953 in Petitioner's home was inseparable (R. 9-14). The legal contention of the State was that the evidence was ". . . so interwoven by the circumstances as to be all logically a part of the testimony of each of the four . . ." (R. 11).

After hearing Petitioner's arguments on the motions, the trial court overruled Petitioner's assertion of federal constitutional rights (R. 14). The rulings of the trial court were preserved in Petitioner's motion for a new trial which was denied (R. 357-363). The federal constitutional issues were presented to the Supreme Court of Illinois, and the asserted federal rights were rejected (R. 372-373). The federal questions preserved were again rejected by the Supreme Court of Illinois upon ruling on Petition for re-hearing (R. 374-375).

The Petition for Certiorari was filed on December 11, 1956, and on June 3, 1957 this Court granted Petitioner's motion for leave to proceed *in forma pauperis* and granted the Petition for Writ of Certiorari to review the judgment of the Supreme Court of Illinois, 353 U.S. 982, 77 S.Ct. 1286.

(b) *Questions presented below.*

The Petitioner in his brief before the Supreme Court of Illinois, as errors relied upon for reversal, urged that the trial court judgment deprived him of rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States when the trial court denied Petitioner's motion to dismiss indictments on the ground of former jeopardy, the motion to exclude all evidence of deaths other than the one forming the basis of the indictment, and the motion to consolidate causes. Petitioner claimed deprivation of federal constitutional rights by action of the State of Illinois which subjected Petitioner to a series of four trials for the same alleged criminal transaction.

In oral argument, and in written brief, Petitioner urged as ground for reversal, the contention that the conviction and sentences of the Petitioner in the trial court denied him the immunities guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article II Section 2 of the Constitution of the State of Illinois.

The Supreme Court of Illinois passed on the federal constitutional questions (R. 371-372).

On Petition for Rehearing, the Petitioner reasserted the federal constitutional questions by calling the attention of the court to the fact that the court in its opinion had inadvertently misapprehended the federal constitutional point of defendant's brief and had overlooked the argument of Petitioner where the Petitioner had said: "We do not consider determinative of the constitutional questions asserted that defendant's case does not fall into the established rules of double jeopardy. The gravamen of the wrong concerning which the defendant complained was the multiple form of the prosecutions against him elected by the State. The series of prosecutions arose out

of the singular event; the deaths of his wife and his three children. It was not the claim of double jeopardy which the defendant asserted in Point X. It was the denial of due process of law and equal protection of the laws resulting from the method of prosecution adopted by the State which deprived the defendant of the benefit of well established rules of Illinois Criminal Law" (R. 374-375).

Summary of Argument

I.

A. This court has not had the occasion to decide the federal questions inherent in Petitioner's case. In *Palko* v. *Connecticut*, 302 U.S. 319 the kind of double jeopardy which would violate the Fourteenth Amendment to the Constitution of the United States was left for consideration by this court in the reservations made by Mr. Justice Cardozo.

However, this court has on occasion decided cases dealing with definition of offenses. These cases did not involve review of state court action nor was there involved the double jeopardy principle as related to the scope of the Fourteenth Amendment.

B. The decisions of the highest courts of some of the states do not aid in determining the federal constitutional questions inherent in Petitioner's case. There is pathetic confusion in American case law concerning double jeopardy. This perhaps is an understatement. The conflict in case law of double jeopardy is recognized by several appellate courts of our states. The development of the law of double jeopardy, and the cases within the "majority" and "minority" viewpoint present all the possible facets of the double jeopardy doctrine. This court has before it *People* v. *Bartkus* (No. 39, this Term), *State* v. *Hoag* (No. 40, this Term), and *Ladner* v. *United States* (No. 41, this Term) as examples. Although Petitioner's case does not res

entirely on the Fourteenth Amendment protection against double jeopardy, it is best to discuss the state cases and put aside American case law before presenting the Fourteenth Amendment due process contentions of Petitioner. These contentions will determine Petitioner's case before this court.

B. (2) It is obvious that if this court were to adopt the reasoning in the cases decided by the highest courts of some of the states, it will result in negation of the federal constitutional protection against the kind of double jeopardy to which Petitioner was subjected by the State of Illinois. Beginning with *People* v. *Allen*, 368 Ill. 368 14 N.E. 2d 397 and through one of the most recent state cases, *Burton* v. *State*, —— Miss. ——, 79 So. 2d 242 (1955), these decisions represent cases in which state courts subordinated the double jeopardy plea to practical problems peculiar to local law administration. None of these cases represent instances in which the double jeopardy doctrine was properly applied, and none of them represent cases in which adequate federal constitutional questions were raised.

B. (3) The decision of this court in *Palko* v. *Connecticut*, expressly reserved for consideration the kinds of double jeopardy by a state which would violate provisions of the Fourteenth Amendment to the Constitution of the United States. The case made out by Petitioner falls within the reservations contained in the language of Mr. Justice Cardozo in *Palko*. Immunity from the kind of state action to which Petitioner was subjected by the State of Illinois is part of the protections to which Petitioner is entitled and it is part of the pledge which the State of Illinois accepted by its adoption of the Fourteenth Amendment to the Constitution of the United States.

Without this immunity from arbitrary state action of this kind, ordered liberty would not be possible. The multiple prosecutions to which Petitioner was subjected by

the State of Illinois, if considered a part of state criminal law procedure, would preclude the administration of a fair system of criminal justice in the State of Illinois.

The instances in which this court has said that the Fourteenth Amendment does not include prohibitions against state imposed double jeopardy, were cases in which the court was discussing technical and specific aspects of double jeopardy which this court said did not violate the Fourteenth Amendment to the Constitution of the United States. The aspects of double jeopardy represented in *Palko, Resweber and Brock* were not proscribed to the states by the Fourteenth Amendment to the Constitution of the United States. This is simply because the kind of double jeopardy manifested by those cases was not so shocking or acute as to violate our sense of fairness in state court criminal procedure.

This cannot be said of the case made here by Petitioner. Petitioner's case is within the protective line of the Fourteenth Amendment to the Constitution of the United States as stated by Mr. Justice Cardozo in *Palko,* because the form of double jeopardy to which Petitioner was subjected by the State of Illinois is so shocking as to violate our fundamental sense of fair play in state court criminal procedure. This court has never said that there cannot be a kind of double jeopardy which would violate the Fourteenth Amendment.

II.

A. The principal federal constitutional question presented by Petitioner is whether he was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by the multiple trials to which he was subjected in the state court of Illinois. In presenting this case to the court invoking the Fourteenth Amendment to the Constitution of the United States, Peti-

tioner urges rejection of technical distinctions between "act" and "offense" and relies upon constitutional provisions that secure to him a fair trial in the courts of the state. The due process of law clause of the Fourteenth Amendment precludes the kind of state action to which Petitioner was subjected. It denied to Petitioner a fair trial and denied to him due process of law.

B. It does not matter that the charges against Petitioner were four separate offenses or a single offense. Petitioner's complaint is that the State of Illinois denied him due process of law when it subjected him to four separate trials under three separate indictments. Each of these indictments charged the alleged murder of one individual, but by a rule evidence, the State of Illinois confronted Petitioner with proof that he had murdered four members of his family. This, even though the allegations of the indictment charged that he had murdered one named member of his family. This procedure was like bringing defendant to trial on a charge that had not been made and convicting him for an offense for which he had not been accused. It is elementary that in such a case this kind of state action would infringe upon the rights guaranteed to Petitioner by the Fourteenth Amendment to the Constitution of the United States. This is exactly what happened to Petitioner in the state court trial concerning which he complains.

C. The multiple trials to which Petitioner was subjected deprived Petitioner of a fair and impartial trial and denied him due process of law because Petitioner was not able to meet and defend the charges against him by the increased number of trials to which he was subjected. The unfair and prejudicial consequences that resulted from the multiple trials are numerous. One of them was that the Petitioner was deprived of testimony which he could have given for himself after he was found guilty of murdering his wife because in any trial for the alleged murder of one

of his children, upon his testifying, it could be shown to the jury, on cross examination of him, or by impeachment that he had been found guilty of murdering his wife. Another unfair and prejudicial consequence was that the number of trials impoverished Petitioner so that he could not afford counsel, or afford means to properly defend himself. Another unfair and prejudicial consequence is that the passage of time dissipated evidence which could have had favorable results in this trial. Another unfair and prejudicial consequence was that the multiple trials gave the prosecution opportunities to improve upon the method of proof so that the penalties progressively increased, finally resulting in extreme penalty. Finally, the Petitioner was subjected to a vindictive method of prosecution determined upon by an over-zealous state prosecutor who decided on his own that only a death sentence would be a proper penalty for Petitioner, even though two juries had refused to consider such a penalty.

III.

A. When considered in its entirety the case presented here by Petitioner is so shocking in its consequences that it presents a departure from fair state criminal court procedure, as required by the provisions of the Fourteenth Amendment to the Constitution of the United States. One of the immunities secured to a citizen of the United States by the Fourteenth Amendment to the Constitution of the United States is a fair trial in a State court, a trial consistent with established criminal procedure free from bias or hatred imposed upon Petitioner by a state officer. Implicit in the Fourteenth Amendment of the Constitution of the United States is this immunity which forms a part of ordered liberty. Without liberty or justice could not exist. For these reasons the federal constitutional protection invoked here cannot be denied to Petitioner.

B. It devolves upon this court to review the case presented here by Petitioner and to pronounce the applicable federal constitutional doctrines which will serve as a guide to future state court prosecutions in cases like his. The grant of review by this court is an occasion for a pronouncement on federal constitutional protection that will secure Petitioner and others like him due process of law in state court criminal proceedings within the full meaning of the Fourteenth Amendment to the Constitution of the United States. These guarantees are essential to liberty and justice and to a fair and enlightened system of criminal law administration. They flow from the Fourteenth Amendment to the Constitution of the United States and impose limitations upon arbitrary state action of the kind to which Petitioner was subjected.

Argument

I.

The Federal Constitutional Questions Which Petitioner Presents for Review Reach Beyond the Double Jeopardy Doctrine; But the Case Made Out by Petitioner Has Appropriate Location Within the Protections of the Fourteenth Amendment and in Reservations Made by Mr. Justice Cardozo in Palko v. Connecticut.

A. This Court Has Not Decided the Federal Questions Inherent in Petitioner's Case.

This court has never decided the precise federal constitutional question presented by Petitioner's case. In *Palko* v. *State of Connecticut*, 302 U.S. 319 at 328, Mr. Justice Cardozo speaking for a majority of the court said, "... What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have

no occasion to consider. We deal with a statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error . . ." In the *Palko* case this court sustained a death sentence against the defendant that had been imposed after a reversal, the reversal had followed an appeal taken by the state pursuant to a Connecticut statute.

This court, however, has had before it several cases presenting issues that required a definition of offenses: In *Burton* v. *U. S.*, 202 U.S. 344, the construction of a federal statute was involved. *Gavieres* v. *U. S.*, 220 U.S. 338, was a case in which this court determined the applicability of the double jeopardy plea after a conviction under an ordinance of the City of Manila and a later indictment under a Philippine Island statute. It was decided that the two prosecutions against *Gavieres* were for different offenses. In *Ebeling* v. *Morgan*, 237 U.S. 625, this court held that opening six mail bags constituted six separate and punishable offenses under the applicable federal statute. In *Morgan* v. *Devine*, 237 U.S. 632, this court construed two federal statutes and determined that the prosecutions were for separate offenses. None of these cases involved review of state court action, nor was there involved any aspect of the double jeopardy principle as related to the scope of the Fourteenth Amendment.

B. THE CASES DECIDED BY THE HIGHEST COURTS OF SOME OF THE STATES ARE NOT HELPFUL IN DETERMINING THE FEDERAL CONSTITUTIONAL QUESTIONS INHERENT IN PETITIONER'S CASE.

(1) *There is pathetic confusion in American case law on the application of the double jeopardy doctrine.*

It is perhaps an understatement to say that there is pathetic confusion in American case law of double jeopardy. For example, in 1937 when the Supreme Court of Illinois decided *People* v. *Allen*, 368 Ill. 368, 14 N.E. 2d 397 the court said:

> "... We recognize the conflict among decisions in other jurisdictions. Some of them are opposed to the views expressed by this court. Many of them are based upon provisions of local laws. Some of them have in effect, been nullified by later decisions of the same tribunals, and others have been criticized by adverse holdings in other jurisdictions ..."

In 1943 the Supreme Court of Virginia in deciding *Lawrence* v. *Commonwealth*, 181 Va. 582, 26 S.E. 2d 54, observed that, "... the courts are in hopeless conflict when it comes to the solution of the problem of identity of offenses ..." The Supreme Court of Florida in *McHugh* v. *State*, 160 Fla. 823, 36 So. 2d 786 (1948), speaking of the issues presented to it on a double jeopardy plea, said, "... briefs have been filed which reveal numerous cases in hopeless conflict ..." By 1949, a reputable authority felt compelled to say that "... the inelastic approach of the judiciary to double jeopardy pleas in the past indicates that they may not prove to be reliable overseers. Courts have generally ignored such pleas, relying on the stereotype formula, the

"same evidence" test, which prescribes denial of the double jeopardy contention if the second charge is so drawn as to be hypothetically provable by different evidentiary facts. As presently used, the test leads not only to unpredictable results, but also is slowly eroding a procedural objective which deserves to be upheld—the finality of criminal judgments. Unavoidable though the act—offense dichotomy may be, we should not permit its being manipulated so as to endanger this objective . . .". Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513, 515 (1949).

It is evident that through a slow evolving process, there has developed in this important area of constitutional law a "majority" and "minority" viewpoint which are best illustrated by the 1956 opinions of the Supreme Court of New Jersey in *State* v. *Hoag*, 21 N.J. 496, 122 A. (2d) 628 (No. , this Term). Not only have these cases blurred the distinction between multiple prosecutions and multiple punishments, but they have by an interesting development covered all the possible facets of the double jeopardy doctrine. As examples, this court has before it the judgment of the Supreme Court of Illinois in *People* v. *Bartkus*, 7 Ill. 2d 138, 130 N.E. 2d 187 (No. 39, this Term), *State* v. *Hoag*, *supra*, from the Supreme Court of New Jersey; and, from the 5th Circuit, *Ladner* v. *United States*, 230 F. (2d) 726 (No. 41, this Term). Although the federal constitutional questions inherent in Petitioner's case do not rest entirely on the asserted 14th Amendment protection against the kind of double jeopardy to which he was subjected by the State of Illinois in the case at bar, it is proper, we think, that we first discuss the contentions of Petitioner against the background of this confused state of American case law and demonstrate the applicability of the 14th Amendment to him and to others like him. We concede that there are cases from the highest state courts which upon superficial analysis seem to uphold the doctrine that the test of federal

constitutional protection against double jeopardy is the identity of the offense as distinguished from the identity of the act. By this process, we submit, we will put aside American case law and proceed to the 14th Amendment, due process of law contentions of the Petitioner which we believe will determine the federal constitutional questions presented by the shocking facts of this case.

(2) *The reasoning in the cases decided by the highest courts of some of the states if followed by this court will negate the federal constitutional protection against the kind of double jeopardy to which Petitioner was subjected by the State of Illinois.*

In the case at bar the theory of the prosecution was that the defendant killed four members of his family. Therefore, each death was a separate offense, even though evidence of the deaths of the entire four was inseparable (R. 9-13). In the trial court the prosecution relied on *People* v. *Allen*, 368 Ill. 368, 14 N.E. 2d 397; and in rejecting the federal constitutional questions presented by Petitioner, the Supreme Court of Illinois cited that case as its only authority. The *Allen* case applied the "act—offense dichotomy" and the "same evidence" test. We think that the reasoning of the Supreme Court in the *Allen* case furnishes a proper starting point to demonstrate the unreliability of the state court decisions as predicates for the application of the federal constitutional protection against double jeopardy.

First, a resort to relevant history. The "same evidence" test had its origin in the early British case *Rex* v. *Vandercomb and Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (1796). That this test has had its difficulty in English criminal law administration is evident from later decided cases. See: *Rex* v. *Sheen*, 2 C & P 634, 172 Eng. Rep. 387 (1827); *King*

v. *Clark*, 1 Brod. & B 437, 129 Eng. Rep. 804 (1824); *Rex* v. *Kupferberg*, 13 Crim. App. R. 166 (1918). In this country the rule of the *Vandercomb* case was first adopted by the Supreme Court of Maine in *State* v. *Brownrigg*, 87 Me. 500, 33 Atl. 11 (1895).

With regard to the origins of the plea of double jeopardy which the Supreme Court of Illinois rejected in Petitioner's case, we find that Blackstone said, " . . . it is to be observed that the pleas of *autrefois* acquit or *autrefois* convict, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime . . . ." Shortly after the Commentaries by Blackstone, we find that the earliest case in which the contention of a prior adjudication was raised was *Rex* v. *Duchess of Kingston*, 20 How. St. Tr. 355 (1776). These legal concepts, in whatever shading, are ancient and they are found in all advanced systems of law. A.L.I. *Double Jeopardy* (1935), Introductory Note, R. 7. Nonetheless, in rejecting Petitioner's plea of former jeopardy, the Supreme Court in its opinion (R. 371-372) said:

> "It is assigned as error that the court denied a 'motion to dismiss' on the grounds of former jeopardy. Defendant had been tried and convicted in two previous trials for the murders of his wife and daughter respectively. He now argues that the two former prosecutions were for the same offense as the present one, and hence operate as a constitutional bar to his prosecution. The long establishment test for former jeopardy, however, is whether the facts charged in the latter indictment would, if found to be true, have justified a conviction under the earlier indictment. (*People* v. *Allen*, 368 Ill. 368.) When this test is applied here it is obvious that under the indictment for murder of his wife a verdict could not be sustained finding him guilty of murdering his son. It is the identity of the offense, and not of the

act, which is referred to in the constitutional guarantee against double jeopardy: And where two or more persons are unlawfully killed, even though by a single act, there is a corresponding number of distinct offenses. (*People* v. *Allen*, 368 Ill. 368.)"

The *Allen* case was decided by the Supreme Court of Illinois in 1937. Students of the subject have placed it in the "majority view" category with those cases holding that the test determining the applicability of the double jeopardy plea is not the identity of the act, that it is the identity of the offense. 8 Ala. Law Rev. 372.

Carefully examined the *Allen* decision is not persuasive authority for rejecting Petitioner's contention that the plea and double jeopardy applied to his case (R. 2-14). *Allen* killed two men in an automobile accident on one of Chicago's streets. He was first indicted for the manslaughter of one of the men killed in the accident. For reasons not clear, he was not brought to trial within the four months required by Illinois Law. On motion properly made, he was discharged. *Allen* was then indicted on a second indictment charging manslaughter of the other of the two men. When brought to trial, *Allen* interposed the plea that he had been put in jeopardy in the first indictment that had been dismissed. This plea the court rejected. *People* v. *Allen*, 368 Ill. 368, 14 N.E. 2d 397.

It is obvious from reading the *Allen* case that the court was confronted with a practical problem dealing with what appears to be a fumble by the prosecutor. What is more intriguing is the reasoning of the court that a dismissal of a case for want of prosecution subjected the defendant to jeopardy. This holding is contrary to the weight of opinion in American case law. Anno: *"Delay in Trial—Discharge—Effect,"* 50 A.L.R. 2d 943, 957, 958. This point aside, however, it is obvious that the court there subor-

dinated the constitutional question to the pragmatic problem of criminal law administration and rejected the double jeopardy plea preferring to make amends through judicial reasoning for what obviously was a mistake by the prosecutor. It doesn't take too much imagination to see that *People* v. *Allen, supra,* would never have been part of Illinois case law if the prosecutor had done his duty in the first indictment charging *Allen* with manslaughter.

As in the *Allen* case, all of the decisions of the highest courts of our State adopting the so called "majority view" represent attempts by the courts to solve some practical local problem of criminal law administration at the expense of constitutional questions involving double jeopardy. For example, in *State* v. *Fredlund* (1937), 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 125, the court was concerned with the problem of proper punishment in a multiple manslaughter case. In *Fleming* v. *Commonwealth,* 284 Ky. 209, 144 S.W. 2d 220 (1940) the defendant was first indicted and convicted of involuntary manslaughter of one Duvall who was killed at the same time that another man, Dakota Stapleton, was killed in an automobile accident. The first charge, the record shows, was on an indictment charging involuntary manslaughter of Duvall. The record shows that the defendant apparently ran down Dakota Stapleton before he hit Duvall. Evidently someone thought it necessary to punish defendant for what appeared to be a deliberate act. He was then indicted for the voluntary manslaughter of Stapleton. The double jeopardy plea in the Stapleton prosecution was rejected. We observe, however, that the Supreme Court of Kentucky reversed the conviction on other grounds. Again, as in cases similar, the practical problem of administering the criminal law was present in the *Fleming* case. *Jeppersen* v. *State,* 154 Neb. 765, 49 N.W. 2d 611 (1951) was a multiple death case arising out of a car collision. The Supreme Court of Nebraska reversed the conviction with

directions to dismiss the prosecution although it rejected the plea of double jeopardy. The case represents another instance of the "act—offense dichotomy".

McHugh v. *State*, 160 Florida 823, 36 So. 2d 786 (1948) represents a case in which the defendant was acquitted of manslaughter resulting from culpable negligence arising out of an automobile collision. Then *McHugh* was prosecuted for manslaughter arising from the operation of a motor vehicle while intoxicated. Two boys were killed in the automobile accident. The court there used the "identity of offense test" but it is obvious that the charges were different. Again this case represents an instance of criminal law administration and a subordinate relegation of constitutional protection against double jeopardy to the problem of criminal law administration to meet local conditions.

Variants of these cases are collated and annotated in 20 A.L.R. 341, 113 A.L.R. 215, 222 and 172 A.L.R. 1050, 1062. We are constrained to observe that the development of the automobile and the increase in multiple deaths arising out of automobile accidents have given momentum to and need for the "act—offense dichotomy" reasoning.

Beginning with *State* v. *Taylor*, 185 Wash. 198, 62 P 2d 1252 (1936), to *Burton* v. *State*, —— Miss. ——, 79 So. 2d 242 (1955) these cases show the impact of the development of the automobile upon a kind of "split personality" reasoning in American case law. We believe, however, that these cases can be put aside as examples of state courts dealing with law administration of the moment. They are not cases construing the application of the federal constitutional protection against double jeopardy.

In none of these cases was there raised a clear-cut federal constitutional question. The so called "minority view" consists of cases in which the opposite results were reached. For example, *State* v. *Wheelock*, 216 Iowa 428, 250 N.W.

617, was a multiple death case in which three persons were killed in an automobile accident. There the court held that the manslaughter of three persons was a single offense. *People* v. *Barr*, 250 N.Y. 104, 181 N.E. 64, involved the prosecution for manslaughter of ten persons killed in a fire caused by negligence in failing to install sprinklers. There too, the court held the multiple deaths were a single offense. *Woodford* v. *People*, 62 N.Y. 117, 20 A.M. Rep. 464, was a case in which the court held that there was a single offense when arson of one building resulted in burning thirty-five other structures. In this same category of cases is *Commonwealth* v. *Veley*, 63 Pa. Super. 489, *State* v. *Cosgrove*, 103 N.J.L. 412, 135 A. 871 and *State* v. *Cooper*, 13 N.J.L. 361, 25 Am. Dec. 490.

These cases represent inconsistency in another important respect: the application of the "act—offense dichotomy" to different classes of crimes. In Kentucky, Massachusetts and Oklahoma where the "act—offense dichotomy" has been applied to multiple death cases, *Fleming* v. *Commonwealth* (1940), 284 Ky. 209, 144 S.W. 2d 220; *Commonwealth* v. *Maguire* (1943), 313 Mass. 669, 48 N.E. 2d 665; *Fay* v. *State* (1937), 62 Okla. Crim. 350, 71 P 768, the appellate courts of these states have held that stealing of property from different owners at the same time and at the same place constitutes one larceny and one offense. *Nichols* v. *Commonwealth* (1879), 78 Ky. 180; *Jacobs* v. *Commonwealth* (1935), 260 Ky. 142, 84 S.W. 2d 1; *Bushman* v. *Commonwealth* (1885), 138 Mass. 507; *Tucker* v. *State* (1912), 8 Okla. Crim. 428, 128 P 313. The cases on this subject and their variants are collected in Anno. *Larceny—Identity of Offenses*, 28 A.L.R. 2d 1182.

In Illinois where the Supreme Court has ruled that manslaughter of two persons in one single automobile accident is a multiple crime precluding application of the double

jeopardy plea, *People* v. *Allen, supra,* the Supreme Court has held that robbery of several persons at a social gathering at the same time and place constitutes a single offense. *People* v. *Perrello,* 350 Ill. 231, 182 N.E. 748 (1932). In New Jersey where it has been held that a motorist accidentally killing one person and injuring another in an automobile accident committed a single offense, *State* v. *Cosgrove,* 103 N.J.L. 412, 135 A. 871, and where a plea of *autrefois* convict was sustained to an indictment for murder, the defendant having been previously convicted of the crime of arson which caused the death of the person for whose murder he was indicted, *State* v. *Cooper,* 13 N.J.L. 361, 25 Am. Dec. 490, the Supreme Court of that state recently held that the robbery of four persons at a tavern at the same time and at the same place was a multiple crime and the defendant could be prosecuted by four separate indictments. *State* v. *Hoag,* 21 N.J. 496, 122 A. 2d 628 (1956), (No. 40, this Term).

In commenting on this peculiar result in legal reasoning, it has been said that " . . . it would be difficult to analyze the reason for this difference in approach to larceny, as distinct from robbery, except that it is self evident that the courts will apply the criminal law with maximum effort to secure the safety of society from armed robbery and the resulting death from innocent victims which has often been found to attend violent felonies. The criminal laws, however, are not invoked to punish harm done to individuals as such, but rather to impose sanctions for crimes done against the State and against the public . . . " 14 Wash. & Lee Law Rev. (1957) 89-85.

This observation on a current case finds support in Blackstone who said that, " . . . a crime or misdemeanor, is an act committed to omitted, in violation of a public law, either forbidding or commanding it . . . "

"The distinctions of public wrongs from private, of crimes and misdemeanor, from civil injuries seems principally to consist in this: that private wrongs, or civil injuries, are an infringement of the privation of civil rights which belong to individuals, considered merely as individuals; public wrongs or crimes and misdemeanors, are a breach and violation of the private rights and duties due to the whole community, considered as a community, in a social aggregate capacity . . ." 4 Black. Com. 3 (Bk. 4 Ch. 1, p. 3).

It may well be, and we respectfully make the suggestion that the federal constitutional questions here presented by Petitioner will require a consideration of the meaning of the word "act" and the word "offense" as it was used at the time of the adoption of the Fifth Amendment to the Constitution of the United States. We have already cited *Blackstone* who said in his definition of *autrefois* acquit and *autrefois* convict as being applicable ". . . upon a prosecution for the *same identical act and crime* . . ." 4 Black. Com. 336. Chitty said that an offense was ". . . the *doing* that which a penal law forbids . . ." 1 Chitty, Pr. 14 The emphasis is on *act* not *crime*.

In a very early American case, *Edwards* v. *Turner*, 6 Rob. (La.) 382 it is said that, ". . . offenses are those illegal acts which are done wickedly and with an intent to injure . . ."

These are not isolated sources of definitions chosen for the purpose of argument. They are conveniently cited to illustrate the point that, ". . . with the ever-expanding number of statutory offenses the protection provided by this principle (the doctrine of double jeopardy) becomes less and less since the doctrine applies only where the defendant is twice placed in jeopardy for the *same offense*

Under rules generally applied by the courts in determining whether the same offense is being charged, the prosecutor may, with little imagination and even less research, reindict for a different offense if his first venture was unsuccessful, even though the defendant is being retried for essentially the same anti-social conduct . . . " Lugar, *Criminal Law, Double Jeopardy and Res Adjudicata* (1954) 30 Iowa Law Rev. 317. Note, 7 Brooklyn Law Rev. 79, 82 (1937). In the case made out by Petitioner, three attempts to obtain a jury verdict imposing the death penalty were unsuccessful.[3]

The charges were the same (R. 2-14), the evidence was the same and was so inseparable that proof of the deaths of all four was made at the trial of Petitioner under each indictment charging murder of one (R. 2-14). Similarity in the cases, the charges, the evidence and the issues were ignored when Petitioner's motions attacking the multiple trials were overruled (R. 2-14). In affirming, the Supreme Court of Illinois applied the "same or different evidence" test. We contend that it was the duty of the court to " . . . evaluate as well as spell out the difference, and determine whether the element it affects is sufficiently important in relation to the other elements involved in both crimes to justify refusal to apply the constitutional protection . . . " Rutledge, Justice, concurring in *District of Columbia v. Buckley* (1942), 75 App. D.C. 301, 128 F 2d 17, 21, cert. denied, 317 U.S. 658. It is evident that the reasoning of the

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[3] Petitioner was tried first for the murder of his wife. He was found guilty and sentenced to serve a twenty year sentence in the Illinois Penitentiary (R. 2). He was next tried for the murder of one of his two daughters. He was found guilty and sentenced to a term of 45 years (R. 2). He was next brought to trial on a third attempt. This ended in a mistrial (R. "C.L." 5). The case at bar was the fourth time Petitioner was brought to trial, and this ended in a verdict finding Petitioner guilty of the murder of his son and imposing the death sentence.

Supreme Court of Illinois overlooked the aspects of Petitioner's case which furnished fundamental bases for applying the constitutional protections to which Petitioner was entitled. The test applied served to negate applicable federal constitutional protection requested and claimed by Petitioner. For these reasons the judgment of the Supreme Court of Illinois cannot stand.

(3) *The decision of this court in* Palko v. Connecticut *expressly reserved for consideration kinds of double jeopardy by a state which would violate the provisions of the Fourteenth Amendment to the Constitution of the United States. The case made out by Petitioner falls within the reservations contained in the language of Mr. Justice Cardozo in* Palko.

One fact is obvious: the kind of double jeopardy to which Petitioner was subjected in this case was no accident of criminal law administration. Appendices "A" to "F" which are attached to this brief show that the state's attorney was determined to get a death penalty against Petitioner. This, despite the refusal of two juries to return a death verdict (Appendices "B", "D", "E" and "F"). A test run of the proof had been made in the first case and the indictments were found faulty. New indictments were obtained (R. 6). Then the decision was made to try Petitioner "one by one to a total of three . . . " (Appendix "D"). Petitioner was to be tried again " . . . and again and again and again, if needed . . . " (Appendix "A"). After Petitioner was tried the second time (R. 2), the prosecutor announced that " . . . We are going to try the other two cases. Nothing short of the death penalty will satisfy the state . . . " (Appendix "E").

We are reminded of the almost prophetic words of Mr. Justice Murphy in *Adamson* v. *California*, 332 U.S. 46, 74:[4] "... occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation ..." Petitioner's case here made out presents such an occasion. The final power to determine the impact of the occasion on any provision of the federal constitution rests in this court. *Cohens* v. *Virginia* (1821), 6 Wheat. (U.S.) 264; *Martin* v. *Hunter's Lessee* (1816), 1 Wheat. 304.

In deciding the substantive federal question raised by Petitioner we believe this court will be considering the kind of double jeopardy case Mr. Justice Cardozo reserved in *Palko* v. *Connecticut, supra.* However, we do not need to contend here, as did *Palko*, that, "... Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." *Palko*, 302 U.S. 319, 323. For our case, we think the Fourteenth Amendment encompasses and protects Petitioner from the kind of double jeopardy to which he was subjected by the State of Illinois. The Amendment in our judgment needs infusion of no greater protective scope than that which the framers originally intended. *Palko* v. *Con-*

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[4] We do not believe it necessary to raise again the issues in *Adamson* v. *California*, 332 U.S. 46 concerning the history of the 14th Amendment and the incorporation of the first eight amendments into the 14th. See, however, the dissenting opinion of Mr. Justice Black in *Adamson* v. *California*, 332 U.S. 46 at page 74. While we do not consider the question necessary to our case, this court may find this the occasion to reconsider the opposing views in *Adamson*.

In this connection, see: Flack, *The Adoption of the Fourteenth Amendment*, 1908. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Cong., 1865-1867 (1914). Green, *Bill of Rights*, the *Fourteenth Amendment* and the Supreme Court, 46 Mich. Law Rev. 869 (1948).

necticut, supra; Adamson v. *California, supra;* Mr. Justice Black, dissenting in *Adamson,* 332 U.S. 46, 74.

At the risk of being over-emphatic, we call this court's attention to limiting language of Mr. Justice Cardozo in *Palko* v. *Connecticut.* The scope of the decision was limited to that kind of double jeopardy represented by the *Palko* case. When this court there held that the Fourteenth Amendment did not protect a citizen of the United States from state imposed double jeopardy, this court was only holding that constitutional protection against the *Palko* kind of double jeopardy was not included in the Fourteenth Amendment to the Constitution of the United States. But the kind of multiple prosecution to which the defendant was subjected by the State of Illinois, a prosecution in which the State was permitted, " . . . after a trial free from error to try the accused over again . . . " and bring another case against him, is the kind of double jeopardy which would fall within the line which as a unifying principle puts Petitioner's case within the Fourteenth Amendment and distinguishes it from those outside its purview. Thus, in this contention we are consistent with the decision of this court in *Palko.* The kind of double jeopardy to which the Petitioner here was subjected by the State of Illinois, the form and substance of multiple trials for the same alleged criminal act, after a trial free from error, is the kind of double jeopardy which shocks our sense of fundamental fairness in criminal prosecutions. This is the standard of fairness in criminal procedure which if abolished would violate, " . . . a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . " *Snyder* v. *Massachusetts,* 291 U.S. 97, 114, 54 S.Ct. 330, 335.

We believe that one of the immunities secured to Petitioner by the specific pledge of the State of Illinois in adopting the Fourteenth Amendment to the Constitution of

the United States is the immunity from the kind of double jeopardy to which he was subjected in this case; and such immunity is implicit in our concept of ordered liberty. We believe that this was the thought that Mr. Justice Cardozo had in mind when he reserved for final consideration by this court the federal constitutional questions now brought by Petitioner.

Since the *Palko* case, the administration of the criminal law in this country has produced many problems. There have been " . . . significant developments in the law pertaining to criminal procedure; these procedural developments are measured to determine the extent to which they safeguard the rights of criminal defendants . . . " Moran, *The Future of The Criminal Law*, 11 Rutgers Law Rev. 549 (1957). Bigelow, *Former Conviction and Former Acquittal*, 11 Rutgers Law Rev. 487-506 (1957).

The legal and constitutional problems presented by cases like Petitioner's have not escaped the attention of students of the subject. For example, the American Law Institute has proposed a model criminal code that incorporates sound solutions to the problem of multiple prosecutions and multiple punishments. See A.L.I., Administration of the Criminal Law, Model Penal Code (Tentative Draft No. 5, April 27, 1956) pp. 29-43, 44-65. The A.L.I. proposals are the results of years of study. See: A.L.I., Administration of the Criminal Law, Proposed Final Draft on Double Jeopardy (1935), Section 5.

In the view of the A.L.I. codifiers, the kind of multiple prosecution to which Petitioner was subjected would not be permissible. This indicates a change in opinion concerning acceptance of doctrines which will serve to terminate criminal litigation in the same way we advocate disposing of issues in civil cases. As an indication of the change of popular opinion on this subject, a recent issue of the Har-

vard Law Review contained this observation: ". . . since a second prosecution for a similar offense will ordinarily not be instituted unless the first has been unsuccessful, collateral estoppel is usually raised by a defendant who had a favorable verdict in the first prosecution. In order that he be accorded the same protection afforded parties in civil actions, he should be freed from the necessity of relitigating an issue once decided in an earlier prosecution involving the same parties . . ." 65 Harv. L. Rev. 820, 875. In Petitioner's case every issue except the identity of the alleged victims had been litigated in the two earlier prosecutions The identity or number of victims do not justify the multiple prosecutions to which Petitioner was subjected.

(4) *The instances in which this court has said that the Fourteenth Amendment does not include prohibition against double jeopardy by a state were instances involving facets of double jeopardy unlike the kind to which Petitioner was subjected by the State of Illinois. This court has never said that the kind of double jeopardy to which Petitioner was subjected in this case will not violate the due process clause of the Fourteenth Amendment.*

We consider now relevant decisions of this court.

Recently, in *Kinsella* v. *Krugar*, 351 U.S. 470, 478 (1956), reversed after reargument, — U.S. —, 77 S.Ct. 1222 (1957), this court said ". . . in addition to the fundamentals of due process, it (the Uniform Code of Military Justice) includes protections which this court has not required a state to provide . . ." This passing reference was to *Palko* v. *State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149. However, neither the language in *Palko* nor the language in any case decided by this court can be taken to mean that there are

no forms of double jeopardy by a state that will infringe upon the prohibitions of the Fourteenth Amendment. The pronouncements of this court are to be construed as meaning only that not every form of double jeopardy is proscribed by the Fourteenth Amendment to the Constitution of the United States.

The double jeopardy principle has nuances. American case law affords examples of its variants. The point at which " . . . jeopardy attaches . . . " has found interesting occurrences. It may be when the jury is sworn, *Cornero* v. *United States*, 48 F. 2d 69, or, not until the first witness is sworn, *Rosser* v. *Commonwealth*, 159 Va. 1028, 167 S.E. 257. In *Wade* v. *Hunter*, 336 U.S. 684 (1849), for instance, this court held that the fact a court martial trial was discontinued, before final action, because of " . . . the tactical situation . . . " of the command at which the court martial trial had been convened, did not preclude a second trial by court martial. Conviction in an appellate court after an acquittal below presented to this Court one form of double jeopardy in *Trono* v. *U. S.*, 199 U.S. 521, 26 S.Ct. 121. Conviction upon review after an acquittal by jury in the trial court presented another aspect of the doctrine in *Kepner* v. *U. S.*, 195 U.S. 100, 24 S.Ct. 797. Mr. Justice Frankfurter, concurring in *Francis* v. *Resweber*, 329 U.S. 459, 469 (1947) called attention to *Ex parte Lange*, 18 Wall. 163, 21 L.Ed. 872 and *In Re Bradley*, 318 U.S. 50, 63 S.Ct. 470 " . . . for the disputations that are engendered by technical aspect of double jeopardy as enshrined in the Fifth Amendment. . . . " To put it succinctly, within the orbit of the Fourteenth Amendment to the Constitution of the United States it is possible for a state to provide for appeals on questions of the law on behalf of the prosecution and not transgress the provisions of the Fourteenth Amendment. *Palko* v. *Connecticut*, *supra*. A state may make two attempts to execute a valid state court judgment, without transgressing

the limits of the Fourteenth Amendment. *Francis* v. *Resweber,* 329 U.S. 459 (1947). And, as this court recently held, a state court may discontinue a trial of a defendant, before proceeding to verdict, and subject the defendant to a second trial, without violating the Fourteenth Amendment and the immunities it includes as part of ordered liberty. *Brock* v. *North Carolina,* 344 U.S. 424 (1953).

Neither *Palko, Resweber* nor *Brock* fell within the proscriptions of the Fourteenth Amendment to the Constitution of the United States because within the limiting language of those decisions they were not cases " . . . so acute and shocking that our polity would not endure . . . " *Palko* v. *Connecticut, supra.* The case here made by Petitioner, however, the division of one alleged criminal act into four separate prosecutions to which Petitioner was subjected by the sovereign power of the State of Illinois solely for the purpose of obtaining the extreme penalty, falls within that line which Mr. Justice Cardozo had in mind, and it is the kind of case which he reserved in the decision rendered by this court in *Palko* v. *Connecticut, supra.*

In affirming Petitioner's conviction the Supreme Court of Illinois completely ignored an important fact when it rejected the federal constitutional questions urged by Petitioner. " . . . A former conviction raises problems different from those that grow from a former acquittal. And the bases of the two pleas are different . . . " Bigelow, *Former Conviction and Former Acquittal,* 11 Rutgers Law Rev. 487, 490 (1957). The distinction between former acquittal and former conviction has always been recognized in Anglo-American Law. Bishop's *Criminal Law* (1892 Ed.), Section 1054, *et seq.* Wharton's *Criminal Law*, Section 560. This court recognized this distinction in *Ex parte Nielsen,* 131 U.S. 176, 9 S.Ct. 672 (1889).

Simco v. *State* (1880), 9 Tex. App. 338, amply illustrates the point we here urge and the court's language accurately states the reasoning we think applicable to the case at bar:

"There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois* acquit and *autrefois* convict, notwithstanding the immense amount of dictum and loose expression to the contrary found in the books. *Autrefois* acquit is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both sine qua non to the sufficiency of the plea. *Autrefois* convict only requires that the transaction, or the facts constituting it, be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A, B, and C, taken at the same time or in one transaction, and he be tried on the first for the theft of A's horse, and the state fails from misnomer, or the defendant, by proving A's consent, should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases would not convict in the former . . . But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to conviction on the other two indictments? Clearly so. And why? Because the transaction—the taking of the three horses at the same time—would constitute but one offense in law, . . . and the plea would be good upon the strength of, and by virtue of, another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single

> transaction as he can, yet he must cut only once. . . . Here is where the doctrine of carving would come in and support the plea."

Obviously, the fact that Petitioner had been twice convicted was ignored by the Supreme Court of Illinois. But for the views which have found acceptance in enlightened systems of criminal law administration, See: A.L.I. *Administration of the Criminal Law, Model Penal Code* (Tentative Draft No. 5, April 27, 1956), pp. 29-55, and the pronouncements of this court lead to the conclusion that to allow the State of Illinois to try the defendant over again after one conviction for the same alleged criminal transaction is to violate a fundamental "concept of ordered liberty" without which Illinois criminal procedure would not conform to a fair system of criminal justice. *Palko* v. *Connecticut,* 302 U.S. 319; *Snyder* v. *Massachusetts,* 291 U.S. 97, 105.

The defendant was convicted at his first trial (R. 2) for the alleged murder of his wife. Consideration of all the evidence involving the deaths of Petitioner's wife and his three children was given by the jury (Appendices "A"-"F"). Yet, the State prosecutor was not satisfied. In a shocking display of arbitrary state power for the sole purpose of obtaining the death penalty, Petitioner was subjected to multiple prosecutions.

Due process of law, encompassing the double jeopardy concept, will not allow and should not allow this kind of terroristic prosecution in the attempt to comply with misconceived notions of proper penalties which are rejected by triers of fact and juries duly empanelled. We respectfully submit that because of infringements upon Petitioner's rights under the Fourteenth Amendment which are shown here, this court should strike down this conviction and reverse it with directions to the highest court of the State

of Illinois that the cause be remanded to the trial court for vacation of the judgment and sentence of death entered against Petitioner.

II.

The Principal Federal Constitutional Question Presented by Petitioner Is Whether the State of Illinois Deprived Him of Due Process of Law When the State Subjected Petitioner to Four Separate Trials Under Three Separate Indictments Each Alleging the Murder of Four Alleged Victims of One Criminal Transaction.

A. In Presenting to This Court an Unusual Case Invoking the Protections of the Fourteenth Amendment to the Constitution of the United States, Petitioner Urges Rejection of Technical Distinctions Between "Act" and "Offense" and Rests His Case Upon Federal Constitutional Provisions That Secure to Him a Fair Trial in the Courts of the State.

We contend that Petitioner was subjected to a form of state action which denied him due process of law in the courts of Illinois when he was prosecuted in four separate trials under three separate indictments which differed only with respect to the name of the alleged victim of the crime charged in each indictment. Petitioner had been brought to trial in the indictment involved in the instant case and a mistrial resulted (R. "CL" 5). On January 3, 1955 (R. 1), he was brought to trial for the fourth time. In the first of two trials, one under the indictment charging him with the murder of his wife, and the second, on the indictment charging him with the murder of one of his two daughters (R. 2), Petitioner was sentenced to the Illinois State Penitentiary

for terms of 20 years and 45 years respectively (R. 2). It was after completion of the first trial that the state prosecutor discovered that new indictments were necessary. The present indictment, together with the ones charging murder of Petitioner's two daughters, was obtained in 1954 (R. 6-7).

It requires very little to demonstrate that the four prosecutions were a device hit upon by the state's attorney as the means by which a death sentence would be obtained against Petitioner (See: Appendices "A" to "F"). It is obvious, we submit, that Petitioner was not subjected to a trial in accordance with fair and orderly criminal procedure in a state court. *Brown* v. *Mississippi*, 297 U.S. 278. The indulgences by the prosecutor in the technical distinctions between the "act" and the "offense" (R. 9-14) were to hide the substance of unfair and oppressive state action to which Petitioner was being subjected.

It is true, as was said by the Supreme Court of Illinois in affirming (R. 371-372), that under an indictment charging Petitioner with the murder of his wife, a verdict would not be sustained finding him guilty of murdering his son. We believe this fact immaterial in determining whether constitutionally the Petitioner should be protected from the multiple prosecutions here shown.

The deaths of Petitioner's wife and his three children were discovered at the same time on December 5, 1953 (R. 30, 366). This is not a case in which the defendant concealed part of his alleged criminal acts. The fair and constitutionally consistent method of prosecution in such instance is codified in A.L.I., Administration of the Criminal Law, Model Penal Code (Tentative Draft No. 5, April 27, 1956), page 34, and it is said that the requirement of a single prosecution is " . . . designed to prevent the state from bringing successive prosecutions based upon essen-

tially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials. The state must prosecute in a single prosecution all offenses committed under the circumstances specified . . . The penalty for the failure to do so is that the state is thereafter barred from subsequently prosecuting for any such offense . . . All that is required is that the charges against the defendant, which are known to the proper officer of the police or prosecution and within the jurisdiction of the single court, be determined in a single rather than multiple trial . . ."

Petitioner here rejects the technical distinction between act and offense. It is clear that the Illinois courts have ambiguously dealt with the problems of this case in failing to set apart the question of multiplicity of trials, *State* v. *Roberts,* 170 La. 727, 129 So. 144 (1930) from the question of multiplicity of convictions or punishment, *Spannell* v. *State,* 83 Tex. Crim. 418, 203 S.W. 357 (1918). The "act-offense dichotomy" used in petitioner's case is the vice that destroyed the basis for federal constitutional protection. As a result petitioner was denied due process of law by subjection to multiple trials for the same alleged criminal conduct.

B. IT DOES NOT MATTER WHETHER THE CHARGES AGAINST PETITIONER WERE FOUR SEPARATE OFFENSES OR A SINGLE OFFENSE, THE GRAVAMEN OF PETITIONER'S COMPLAINT IS THAT THE STATE OF ILLINOIS DENIED HIM DUE PROCESS OF LAW WHEN IT SUBJECTED PETITIONER TO FOUR SEPARATE TRIALS UNDER THREE SEPARATE INDICTMENTS EACH ALLEGING THE MURDER OF ONE INDIVIDUAL, AND AT EACH TRIAL PETITIONER WAS CONFRONTED WITH PROOF THAT HE HAD MURDERED FOUR MEMBERS OF HIS FAMILY.

In the case at bar Petitioner was brought to trial on an indictment charging him with the murder of his son Vincent Frank Ciucci (R. "C.L." 2). When the trial began he made a motion to exclude all evidence or references to deaths other than the one which formed the basis of the indictment (R. 3-4).

In arguing the motion, counsel for Petitioner stated the reasons for the motion. He stated that he wanted to avoid continuous objections to evidence of deaths other than the one for which Petitioner was being tried (R. 16-17). The prosecution, on the other hand, insisted that the evidence was ". . . so interwoven by the circumstances as to be all logically a part of the testimony of each of the four. For that, only the defendant can blame himself as to the circumstances of the death of the four people . . ." (R. 11).

The prosecution then proceeded on that theory. The court, over objections of Petitioner, allowed in evidence proof that the defendant had killed his son Vincent for whose alleged murder Petitioner was being tried, and evidence that Petitioner killed his wife and two daughters (R. 111, 223-236, 278-290). In fact, the substantive criminal charge against Petitioner was that he had exterminated

his family (R. 30-31). By motion, Petitioner had alleged that the evidence and the facts upon which the instant indictment was based were the same as those in the prior two indictments under which he had been tried, convicted and sentenced (R. 2).

There was no denial of these allegations. In fact the theory of the prosecution agreed with Petitioner's contentions. There was no claim that the evidence submitted to the jury in the instant case was in any way dissimilar to the evidence that already had been submitted to the two previous juries (R. 9-14).

It is an elementary principle of criminal law that notice of specific charge and a chance to be heard in a trial of the issues raised by that charge are among the constitutional rights of every accused in a criminal proceeding. This court has said that there is no principle of procedural due process more clearly established than this one. *Cole* v. *State of Arkansas*, 333 U.S. 196, 201. It is obvious that there was no charge in the indictment that Petitioner had exterminated his family. It was as much a violation of due process for the trial court to find the Petitioner guilty on a charge on which he was never tried as it would have been for the trial court to have found Petitioner guilty upon a charge that had not been made. *DeJonge* v. *State of Oregon*, 299 U.S. 353, 362. *In Re Oliver*, 333 U.S. 257.

State law of evidence cannot take precedence over these fundamental constitutional doctrines. The prosecution relied on a rule of evidence pronounced by the Supreme Court of Illinois in *People* v. *Murphy*, 276 Ill. 304. The State of Illinois, however, has no power through its judicial proceedings, to impose upon Petitioner a rule of evidence which will deprive him of immunities granted him by the federal constitution. *United States ex rel. Collins* v. *Claudy*, 204 F.2d 624, 627.

The state court proceedings against Petitioner were the equivalent to a trial in which he was found guilty of a charge that had never been made against him. The evidence admitted against him proved a crime with which he had never been charged. The evidence was admitted to show that Petitioner had murdered four people. The indictment charged him with the murder of one. There was no process or notice by which Petitioner could tell he was going to be confronted with evidence of such an enormous crime. As a result, Petitioner was denied due process of law by denial of notice to him that he was going to be subjected to a trial on an accusation for the murder of four members of his family.

C. The Multiple Trials to Which Petitioner Was Subjected Deprived Petitioner of a Fair and Impartial Trial Because the Ability of the Petitioner to Meet and Defend the Charges Against Him Decreased as the Number of Charges Increased.

There were many unfair and prejudicial consequences from the multiple trials to which Petitioner was subjected in the case at bar. Only a few are needed as illustrations.

First, Petitioner could not testify on his own behalf. This is a different question than was presented in *Adamson* v. *People of the State of California*, 332 U.S. 46. Here there is no statute allowing comment on failure of the defendant to testify. Here is purely arbitrary state action on the part of an over-zealous state prosecutor. The court will quickly appreciate the fact that after Petitioner was found guilty of murdering his wife, testimony by him in the instant case would expose him to cross-examination that would have shown to the jury that he had been found guilty by

another jury for the same criminal transaction. The impact of this proof is plain.

Second, the multiple trials impoverished the Petitioner. This is shown by his request for appointment of counsel. The court did appoint counsel for Petitioner (R. 4-5).

Third, there was a long delay between the trial of Petitioner for murder of his wife in December, 1953 and the instant trial in January, 1955 (R. 1, 2-6). Time dissipates evidence.

Fourth, the multiple trials were practice grounds by which the method of obtaining the death sentence was devised. These were repeated trials after hearings free from error, *Palko* v. *Connecticut, supra. Brock* v. *North Carolina, supra,* Mr. Justice Frankfurter, concurring, 344 U.S. 424, 429. It is true reference was there made to acquittals. But this court has treated former acquittals as being on the same doctrinal plane as former conviction with regard to its meaning. *Ex Parte Lange,* 85 U.S. 163. Further, we can never allow it to be said that the acquitted have rights under our constitution that the convicted cannot enjoy. See, *Grant, Successive Prosecutions by State and Nation; Common Law and British Empire Comparisons,* 4 U.C.L.A. Law Rev. 1 (1956).

Finally, the form of state action to which Petitioner was subjected was arbitrary because it stemmed from the whims of an over-zealous prosecutor. Absent here is any statutory enactment guiding state policy. See: Appendices "A" to "F." It is evident that Petitioner was made the object of attack by the full panoply of state power without standards.

III.

When Considered in Its Entirety, the Case Made Out by Petitioner Is So Shocking in Its Consequences That It Presents a Departure From Fair and Orderly State Court Criminal Procedure Required by the Provisions of the Fourteenth Amendment to the Constitution of the United States.

A. A Fair Trial, Consistent With Orderly Criminal Procedure, Free From Bias and Hatred, Is One of the Guarantees of the Fourteenth Amendment to the Constitution of the United States.

This court has said that ". . . due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice' . . ." *Rochin* v. *People of the State of California*, 342 U.S. 165, 173.

It is true that the State of Illinois is free to regulate its criminal procedures in accordance with its own conceptions of policy; but it cannot do that which 'offends principles of justice' so rooted in the traditions and conscience of our people as to be ranked as fundamental . . ." *Snyder* v. *Massachusetts, supra.*

The action of the state prosecutor in electing to subject Petitioner to the multiple trials in the manner shown in this record offends principles of justice so rooted in the traditions of our people as to be ranked as fundamental . . ." It was capricious conduct on the part of one official. It was state action violative of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U.S. 278; *Rochin* v. *People of the State of California, supra.* We need not

say whether there is here involved 'due process of law' or 'equal protection of the laws', even though these constitutional doctrines are not interchangeable. *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

B. It Devolves Upon This Court to Review the Case Presented by Petitioner and Announce the Federal Constitutional Doctrines Applicable to Cases Like His as a Guide for Future State Court Criminal Proceedings.

It may be a form of flattery, but we do not believe this court granted certiorari in this and the companion cases merely to give current constitutional sanction to the "act-offense dichotomy" or affirm a federal base for the "same offense-evidence test." This case presents a kind of double jeopardy encased in arbitrary and prejudicial state action which violates the fundamental sense of decency in state court criminal trials. The extent to which the record purveys the federal constitutional questions for review, this court will determine. *Williams* v. *Georgia*, 349 U.S. 375. To the extent that this court finds the proceedings here involved depart from ". . . the basic requirements of orderly justice and hence due process . . ." this court will correct the judgment of the courts of Illinois. *Wolf* v. *People of the State of Colorado*, 338 U.S. 25; *Rochin* v. *People of the State of California*, *supra*.

Conclusion

For these reasons, it is respectfully submitted that the decision and judgment of the Supreme Court of Illinois be reversed, or in the alternative be reversed and remanded with directions.

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Appendix A

The following appeared in an article in the *Chicago Sun Times*, 4 star final edition, Friday, March 19, 1954, page 1:

Ciucci Gets 20 Years

Verdict Crumples
Murderer Of Wife

By Ray Brennan

A jury has convicted Vincent Ciucci of murdering his wife. His sentence was fixed at 20 years in prison. The verdict was returned at 9:15 p.m., Thursday in Criminal Court.

The term was within six years of the lightest sentence the jury could have voted on a guilty finding.

The minimum term for murder in Illinois is 14 years and the maximum is death in the electric chair.

The chief prosecutor, Samuel A. Papanek, immediately announced he believed Ciucci should be tried again— "and again and again and again, if needed."

State's Attorney Gutknecht announced previously he would settle for nothing short of death in the case.

If the jury let him off with

Continued on Page 2

anything less than the electric chair for the killing of the wife, Anne, 27, Gutknecht said he would continue prosecuting.

Appendix B

The following appeared in an article in the *Chicago American*, 4 star final edition, Friday, March 19, 1954, page 1:

Gutknecht Hits Ciucci's 'Easy' Penalty

State's Attorney Gutknecht today blasted the verdict of a jury which sentenced Vincent Ciucci to 20 years for murdering his wife.

The State's Attorney declared:

"The verdict is a moral injustice to society when a man is guilty of killing his wife.

"To give a sentence like this, it's just like slapping him on the wrist.

"If a man who was guilty of killing his wife doesn't deserve death, than (sic) I don't know why he was being tried."

3 Trials Loom

Gutknecht said Ciucci will be tried on three indictments charging him with slaying his three children.

The Criminal Court jury never considered the death penalty, it was revealed to The Chicago American by a member of the jury which convicted the 28-year-old grocer.

The sentence, only six years more than the lightest punishment an Illinois jury can inflict on a murderer, stunned Assistant State's Attorney, Samuel A. Papanek, who had demanded Ciucci pay for the Crime with his life.

Second Trial

Papanek announced if the death penalty is spurned a second time, Ciucci will be tried for the third murder and, if necessary, for the fourth.

Three ballots were taken before the verdict and sentence were agreed upon, juror Maynard R. Bell, 52, of 9750 Woodlawn Ave., revealed.

Bell cast a guilty ballot each time, he said although "deep down in my heart I knew Ciucci did not kill his wife."

Appendix C

The following appeared in an article in the *Chicago Daily News*, Final Markets Red Streak edition, Friday, March 19, 1954, page 1:

Won't Rest Till Ciucci Gets Chair: Gutknecht

Goal Still Chair for Ciucci

Gutknecht to Rush His Next Trial

State's Attorney Gutknecht said Friday he won't be satisfied with anything less than the death penalty for Vincent Ciucci.

He planned to press for a speedy trial of the defendant on one of the other murder indictments.

Ciucci was given 20 years by a jury Thursday for the murder of his wife.

He is under separate indictment in the death of each of his three children—Vincent, Jr., 9, Virginia 8, and Angeline, 4.

Hence, he could be tried three more times.

* * * *

Gutknecht, displeased with the jury's fixing of 20 years, said:

"The jury clearly knew Ciucci was guilty. The crime was so horrible that despite the clear evidence they could not subconsciously believe it.

"The result was an irrational decision that only a Freud could analyze. Normal human beings find it hard to believe a crime of such utter depravity is possible."

Assistant State's Attorney Samuel Papanek, who had asked the death sentence for Ciucci, declared:

"Since this was a finding of guilty it should have been a more severe sentence."

Appendix D

The following appeared in an article in the *Chicago Sun-Times,* Sunday, March 21, 1954, page 22:

Did the Law Bungle
Ciucci Murder Case?

"Gutknecht (a Democrat) and McCarron (a Republican) had a political football game—but Ciucci was the only one who got kicked."

As a result of that argument, the jurors have said, they sentenced Ciucci to 20 years—only six years over the absolute minimum of 14 years for murder in Illinois.

On the first ballot, in fact, five of the 12 men and women voted to acquit him.

Gutknecht now has stated that he will prosecute Ciucci for the murder of the children—one by one to a total of three, if necessary—until he gets a death verdict.

But Toudor pointed out that the strongest case against Ciucci involved the death of his wife, for which Ciucci received a sentence which could terminate with a parole in less than seven years.

Appendix E

The following appeared in an article in the *Chicago Daily News,* Final Markets Red Streak edition, Thursday, July 29, 1954, page 1.

Ciucci Gets 45 Years
For Killing Daughter

Faces 2 more
Murder Trials

Jury Fixes Punishment;
Never Considered Death Penalty

Vincent Ciucci, 28, was convicted by a Criminal Court Jury Thursday of the murder of his daughter Angeline, 4.

His punishment was fixed at 45 years in prison. At an earlier trial Ciucci was sentenced to 20 years for the slaying of his wife Anne, 27.

CIUCCI will be tried for the murder of the two other children, said IRWIN D. BLOCH, acting State's Attorney.

"We are very disappointed, as we were in the first trial," BLOCH declared. "We are going to try the two other cases.

"Nothing short of the death penalty will satisfy the State and we hope to get a jury that will realize the magnitude of this crime."

The jury, which reached its verdict Thursday after being locked up over night, frankly called its decision a compromise.

Its foreman, WILLIAM M. MAYNER, 32, of 7932 A. Ridgeland, an Illinois Bell Telephone Company, employee, said eight ballots were taken.

* * *

THE JURY stood 9 to 3 for guilty on the first ballot, then agreed on guilt on the third ballot. Then wide disagreement resulted over the penalty, MAYER said.

The suggested punishment ranged from 14 to 199 years.

The electric chair was never considered, MAYER declared.

He said the seven women and five men felt it was mostly a circumstantial case, lacking direct evidence of guilt.

APPENDIX F

The following appeared in an article in the *Chicago Daily Tribune*, 3 star City Home edition, Friday, July 30, 1954, page 11:

VINCENT CIUCCI
GETS 45 YEARS
IN 2D MURDER

State to Seek Death in
2 Other Cases

The state will press its efforts to send VINCENT CIUCCI, 27, to the electric chair for the slayings of his wife and three children. Acting State's attorney IRWIN BLOCH announced yesterday after a second jury refused to inflict the death penalty.

Assistant State's Attorneys SAMUEL PAPANEK and JOSEPH T. McGOVERN, who prosecuted the second murder trial, were uncertain whether the state would proceed with the two remaining indictments. BLOCH, after conferring with them, left no doubt.

"We are disappointed," BLOCH said. "Nothing short of the death penalty is enough for CIUCCI. We definitely will try the other cases. We hope that some day a jury will realize the enormity of this crime. In this case there was the premeditated murder of a wife and three children."

Three Ballots on Guilt

WILLIAM M. MAYER, 32, of 7932 Ridgeland Ave., the foreman, was designated as the jury's spokesman. He said the jurors took three ballots to agree on CIUCCI's guilt and five more to decide on the punishment. None of the jurors, he said, favored the death penalty.

MAYER explained that while the jurors were satisfied that CIUCCI was guilty, they felt that it was not proper to impose the death penalty in a case based on circumstantial evidence. The jurors might have felt differently if there had been direct evidence, he added.